have been a number of decisions by the state courts,[19] the lower federal courts,[20] and the Supreme Court [21] enunciating the same principle, though applied to facts less like those of the principal case. A practical argument against the result reached in New York was suggested in the dissenting opinion in the lower court,[22] namely, that it may become necessary for the employer to prove his own negligence, when sued in the state courts, in order to come in under the federal act. The employer would hardly choose to adopt this unpalatable course, especially as the question of negligence, being necessarily in issue as a jurisdictional fact in the state court, would seem to be *res judicata* in the federal court. "The result would be in most cases to give the injured party an option to claim under the Compensation Act or under the federal liability law." The fundamental error of the New York and New Jersey decisions seems to be that they consider a mere difference in the theory of recovery upon which the two acts are based tantamount to a difference in subject matter.

SUITS AGAINST FOREIGN EXECUTORS. — Although an executor is sometimes conceived as continuing the person of the decedent for the purpose of the devolution of property,[1] and although he has title to the decedent's chattels,[2] each state in which property is found may set up a separate administration; [3] and it is settled in most jurisdictions that at common law and in the absence of special circumstances [4] he cannot

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[19] Flanders *v.* Georgia & S. F. Ry. Co., 67 So. 68 (Fla.); Wagner *v.* Chicago & Alton R. Co. 265 Ill. 245, 106 N. E. 809; Corbett *v.* Boston & Maine R. Co., 219 Mass. 351, 107 N. E. 60; Kamboris *v.* Oregon & Washington R. & Navigation Co., 146 Pac. 1097 (Ore.); Eastern Ry. Co. *v.* Ellis, 153 S. W. 701 (Tex.).

[20] Fulgham *v.* Midland Valley R. Co., 167 Fed. 660, 662; Dewberry *v.* Southern Ry. Co., 175 Fed. 307; Taylor *v.* Southern Ry. Co., 178 Fed. 380, 382; Bottoms *v.* St. Louis & S. F. R. Co., 179 Fed. 318, 319.

[21] Second Employers' Liability Cases, 223 U. S. 1; Missouri, K. & T. Ry. Co. *v.* Wulf, 226 U. S. 570, 576; Mich. Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 66; St. Louis, I. M. & So. Ry. Co. *v.* Hesterly, 228 U. S. 702, 704, overruling 98 Ark. 240; Wabash R. *v.* Hayes, 234 U. S. 86, 89.

[22] Winfield *v.* New York Central & H. R. R. Co., 153 N. Y. Supp. 499, 504.

[1] See 1 WOERNER, ADMINISTRATION, § 157.

[2] See 2 WHARTON, CONFLICT OF LAWS, 3 ed., 1384.

[3] See 2 WHARTON, CONFLICT OF LAWS, 3 ed., 1360–1361; STORY, CONFLICT OF LAWS, 8 ed., § 513; 1 WOERNER, ADMINISTRATION, § 158.

[4] Where the executor having assets in his possession has repudiated the authority of his own state and taken them out of its power he may be sued where found. Williamson *v.* Branch Bank at Mobile, 7 Ala. 906; McNamara *v.* Dwyer, 7 Paige (N. Y.) 239; Lake *v.* Hardee, 57 Ga. 459. See Lewis *v.* Parrish, 115 Fed. 285, 287. But *cf.* Black *v.* Woodman, 5 Redf. (N. Y.) 363; Hedenbergh *v.* Hedenbergh, 46 Conn. 30. He may also be sued in any place where he meddles with assets. Marcy *v.* Marcy, 32 Conn. 308. *A fortiori* where he has committed both the above wrongs. Campbell *v.* Tousey, 7 Cow. (N. Y.) 64. However the doctrine of executor *de son tort* is generally obsolete. See Hopper *v.* Hopper, 125 N. Y. 400, 404, 26 N. E. 457, 458. An executor may be sued on a contract he has made as executor. Johnson *v.* Wallace, 112 N. Y. 230. And he may sue anywhere on a judgment he has recovered. Biddle *v.* Wilkins, 1 Pet. (U. S.) 686; Talmage *v.* Chappel, 16 Mass. 71; Lawrence *v.* Lawrence, 3 Barb. Ch. (N. Y.) 71. Such a judgment against him as plaintiff is also conclusive everywhere. Coram *v.* Ingersoll, 148 Fed. 169.

sue [5] or be sued [6] outside of the jurisdiction in which he qualifies. Consequently administration appears to be substantially an *in rem* proceeding.[7] On this ground a New York statute providing in broad terms that a foreign executor might sue or be sued on the same basis as a non-resident [8] has recently been construed by a federal court, in a case arising under the Sherman Act, to open the New York courts to litigation only in cases where the law of the decedent's domicile allows it. *Thorburn* v. *Gates*, 225 Fed. 614. The broad and most obvious construction of the statute, it was thought, would lead to its being in violation of the due process clause, on the ground that it authorized an attempt to dispose of decedent's goods over which another state had exclusive authority. A construction which limited the application of the statute to cases where property is in the jurisdiction was rejected as too artificial.[9] It is not very clear why this construction is any more strained than the one adopted and it seems quite possible that the intention of the legislature, in so far as the question was adverted to, was only to affect the local assets.

But however that may be, it is submitted that another view of the constitutional question is tenable. A backhanded but still a forceful way of presenting the view of the court is this: All judgments founded on valid jurisdiction are entitled to full faith and credit. But, in view of the common understanding of the nature of administration, other states clearly might disregard any judgment which purported to bind the executor with respect to assets of the estate generally.[10] Such a judgment must, therefore, be without jurisdiction, and consequently it would be a violation of due process to render it. The well-known decision of the Supreme Court [11] that the full faith and credit clause did

[5] Executors and administrators rest on the same basis in this respect. Johnson *v.* Powers, 139 U. S. 156; Noonan *v.* Bradley, 9 Wall. (U. S.) 394; Duchess D'Auxy *v.* Porter, 41 Fed. 68; Mansfield *v.* McFarland, 202 Pa. St. 173, 51 Atl. 763. See STORY, CONFLICT OF LAWS, 8 ed., § 513; 2 WHARTON, CONFLICT OF LAWS, 3 ed., § 608.

[6] Here also there is no distinction between executors and administrators. Durie *v.* Blauvelt, 49 N. J. L. 114, 6 Atl. 312; Vaughn *v.* Northrup, 15 Pet. (U. S.) 1; Jefferson *v.* Beall, 117 Ala. 436, 23 So. 44; Hedenbergh *v.* Hedenbergh, 46 Conn. 30; Davis *v.* Smith, 5 Ga. 274; Tyler *v.* Bell, 2 Myl. & C. 89. See authorities in 27 L. R. A. 101 n.; STORY, CONFLICT OF LAWS, 8 ed., § 513; 2 WHARTON, CONFLICT OF LAWS, 3 ed., § 616. See also Emery *v.* Batchelder, 132 Mass. 452.

[7] See Burton *v.* Williams, 63 Neb. 431, 88 N. W. 765; Braithwaite *v.* Harvey, 14 Mont. 208, 36 Pac. 38; Jefferson *v.* Beall, 117 Ala. 436, 23 So. 44.

[8] CODE CIV. PROC., § 1836 *a*.

[9] The court conceded that such a statute would be constitutional. Cady *v.* Bard, 21 Kan. 667; Manley *v.* Mayer, 68 Kan. 377, 75 Pac. 550; *In re* McCreight, 9 Oh. Dec. 454.

[10] Jefferson *v.* Beall, 117 Ala. 436, 23 So. 44; Elting *v.* First Nat. Bank, 173 Ill. 368, 50 N. E. 1095. See Cherry *v.* Speight, 28 Tex. 503.

[11] Haddock *v.* Haddock, 201 U. S. 562. But see Holmes, J., dissenting, at p. 632. See also Goldey *v.* Morning News, 156 U. S. 518, 521; Conley *v.* Mathieson Alkali Works, 190 U. S. 406, 411. If the law were otherwise recognition of a decree not entitled to full faith and credit under the doctrine of Haddock *v.* Haddock would be *a fortiori* a violation of due process. Yet this is done without question of its constitutionality. Gildersleeve *v.* Gildersleeve, 88 Conn. 689, 92 Atl. 684. Earlier *dicta* may, however, leave the Fourteenth Amendment out of consideration. See Pennoyer *v.* Neff, 95 U. S. 714, 729 (1877); Hall *v.* Lanning, 91 U. S. 160, 168, 169 (1875). And of course cases arising before that Amendment are inapplicable. D'Arcy *v.* Ketchum, 11 How. (U. S.) 165; Moulin *v.* Ins. Co., 24 N. J. L. 222. A recent decision of the

not embrace a divorce decree admittedly valid in the state where it issued,[12] while not perhaps a fortunate one as regards divorce, certainly establishes that the questions of full faith and credit and due process do not necessarily stand and fall together. The practical objection to that case, that it does not provide for a uniform operation of divorce decrees throughout the country, has no parallel in the present case, where those who attack the statute, and not its supporters, are insisting that each state be allowed to go its own way without molestation. Statutes similar to the present have been expressly upheld under the broad construction in two states [13] and recognized by *dicta* in federal courts.[14] In another state a foreign executor may be sued at common law in the absence of an affirmative showing that a judgment would trench unduly upon the jurisdiction of another court already attached.[15] Besides various minor indications that such a statute is possible,[16] the present law as laid down both by the federal [17] and the New York

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Supreme Court is distinguishable. Riverside Mills *v.* Menefee, 237 U. S. 189. It was there said at p. 197: "The two clauses [full faith, and due process clauses] are harmonious, and because the one may be applicable to prevent a void judgment being enforced affords no ground for denying efficacy to the other in order to permit a void judgment to be rendered." These words, however, are plainly directed only against the argument that the due process clause does not affect the power to issue such a judgment, and that until there was an attempt to take property under it no objection could be made. *Cf.* Butler *v.* Steckel, 137 U. S. 21. Nor has the decision in Riverside Mills *v.* Menefee, *supra*, that a particular judgment was void any bearing on the question now under discussion.

[12] Maynard *v.* Hill, 125 U. S. 190. See Haddock *v.* Haddock, 201 U. S. 562, 569.

[13] Dewey *v.* Barnhouse, 75 Kan. 214, 88 Pac. 877; Craig *v.* Toledo, Ann Arbor & N. M. R. Co., 2 Oh. N. P. 64. See *In re* McCreight, 9 Oh. Dec. 454. See Williams' Adm'rs *v.* Walton's Adm'rs, 28 Oh. St. 451, 464. 2 WHARTON, CONFLICT OF LAWS, 3 ed., 1373–1374.

[14] See Courtney *v.* Pradt, 135 Fed. 818, 822, 825; Courtney *v.* Pradt, 160 Fed. 561, 563. The Supreme Court has refrained on a bill of review from upsetting a judgment against a representative because of a statute only permitting him to sue. See Lawrence *v.* Lawrence, 143 U. S. 215, 222. Such a statute does not in general permit him to be sued by implication. Burton *v.* Williams, 63 Neb. 431, 88 N. W. 765; Gordon *v.* Estate of Simonton, 10 Fla. 179.

[15] Laughlin *v.* Solomon, 180 Pa. St. 177, 36 Atl. 704. The case came upon demurrer and it is clear both from the synopsis of pleadings reported and the argument for the defendant that there was no allegation that assets were in the jurisdiction. See 180 Pa. St. 177, 178.

[16] A Wisconsin statute similar to the present statute, except that it contemplated that the initiative be taken by the executor, appears to have escaped adverse criticism. See Murray *v.* Norwood, 77 Wis. 405, 46 N. W. 499. Robertson *v.* Chicago, St. P. M. & O. Ry. Co., 122 Wis. 66, 74, 99 N. W. 433, 436; Voss *v.* Stoll, 141 Wis. 267, 124 N. W. 89. A Kentucky court will recognize an Ohio decree against a Kentucky administrator if he submits himself to defend the action. Davis *v.* Connelly's Ex'r, 4 B. Mon. 136. It is doubtful whether the executor's consent should be material, for if such a judgment is to be disregarded it should probably be on the theory that he cannot bind the estate in another jurisdiction. See Braithwaite *v.* Harvey, 14 Mont. 208, 36 Pac. 38, 42; Judy *v.* Kelley, 11 Ill. 211, 215; Gordon *v.* Estate of Simonton, 10 Fla. 179, 196; Davis *v.* Smith, 5 Ga. 274; 1 WOERNER, ADMINISTRATION, § 160.

[17] Where the same person is domiciliary and ancillary executor a judgment against him at the domicile has been held conclusive against him in the ancillary jurisdiction. Carpenter *v.* Strange, 141 U. S. 87; Owsley *v.* Central Trust Co., 196 Fed. 412. A judgment against an ancillary executor has been held admissible in evidence against a different executor at the domicile. Hill *v.* Tucker, 13 How. (U. S.) 458.

courts [18] is not consistent with the tenet that courts in one jurisdiction cannot affect the disposition of assets in another.

The holding in the principal case means that the present views of the majority of the states as to the nature of the liability of a foreign executor must be imposed upon the minority simply because a question of jurisdiction is involved, and it prevents a New York court from giving a judgment which might be recognized by some states other than that of the domicile, in addition to being enforced against assets found in New York then or later. Were it not for the court's clever construction, which theoretically at least allows an opening for gradual change, the result of holding the broad construction unconstitutional would be to saddle the present majority rule upon all the states for all time, unless the federal constitution is to be cluttered up with amendments of a purely legislative character. If it is a principle imbedded in the constitution that administration is *in rem*, it does not seem desirable to allow other courts than that in which the *res* to be disposed of is situated to have jurisdiction over it, or the courts or legislature of that state to delegate their authority to foreigners. If, however, the explanation is that one state may give a judgment *in personam* where the state of domiciliary administration agrees to recognize it, it seems equally reasonable to allow any state to so consider it, and to allow the judgment to affect any assets that may be in that state at any time, or in any other state which may adopt the same theory.[19] There is certainly nothing logically impossible in permitting the states to maintain a reasonable difference of opinion as to the nature of the liability of a foreign executor. As pointed out in the principal case, it is probably only for historical reasons that the title and obligation of the executor are not regarded as effecting a substitution of his personality for that of the dead man, recognized everywhere, just as is done in the case of the heirs. Descended from the *hæres factus* of Rome it seems to be chiefly due to the evolution of administration through the hand of the ordinary that the executor now stands upon a different basis. The prevailing theory can hardly be considered so vital and fundamental a part of our institutions that any judgment not in accordance therewith must be invalid under the due process clause.

Furthermore, statutes permitting a foreign executor to sue are uniformly enforced without consulting the wishes of the court first appointing him. Eells *v.* Holden, 12 Fed. 668; Murray *v.* Norwood, 77 Wis. 405, 46 N. W. 499; Moir *v.* Dodson, 14 Wis. 279. See 2 WHARTON, CONFLICT OF LAWS, 1373. And judgment against him is conclusive everywhere and thus deprives the estate at the domicile of possible assets. Coram *v.* Ingersoll, 148 Fed. 169. Under such statutes he may be admitted as a formal defendant to assert an affirmative claim. Brown *v.* Brown, 35 Minn. 191; Decker *v.* Patton, 20 Ill. App. 210, affirmed, discussing other points, 120 Ill. 464, 11 N. E. 897. But not in general as a defendant. See n. 14, *supra*.

[18] Judgment has been given against an ancillary executor appointed in New York when the law there forbids any local assets to be applied to the claims of creditors of the plaintiff's class. Hopper *v.* Hopper, 125 N. Y. 400, 26 N. E. 457.

[19] Pennsylvania will recognize such a judgment. Evans *v.* Tatem, 9 S. & R. 252. See Laughlin *v.* Solomon, 180 Pa. St. 177, 183. It would seem that any state which allows suit against foreign executors should recognize such judgments as a matter of comity, but a recent Ohio inferior court case is suggestive of the contrary. Albrecht *v.* Hoffman, 16 Oh. N. P. n. s. 285.